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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 293

LEBANON STEEL FOUNDRY (A PENNSYLVANIA CORPORATION),

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

H. RANK BICKEL, JR.,
CLARENCE D. BECKER,
H. P. MCFADDEN,
Counsel for Petitioner.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Jurisdiction	1
Summary and short statement of the matter involved	2
The question presented	6
Reasons relied on for the allowance of the writ	6
Brief in support of petition for writ of certiorari	9
Opinions below	9
Jurisdiction	9
Statement of the case	9
The law	9
Specification of error	9
Summary of argument	10
Argument	11
A. The validity of the check-off card as proof of the authority of the Union to act as bargaining representative	11
(1) On the face of the card itself	11
(2) With reference to evidence adduced of an alleged usage	17
B. The effect of following the doctrine of the court below	17
Conclusion	20
Appendix	21

Citations.

Cases:	
Dobbs v. *Zink*, 290 Pa., 243	14
N. L. R. B. v. *Bradford Dyeing Assn.*, 310 U. S. 318	18
Torres v. *Lothrop*, 231 U. S. 171	12
Text Books:	
Restatement of Agency:	
Section 1	12
Section 7	13
Section 12	13
Section 26	12, 13
Section 32	14

Page

Mechem on Agency (2nd ed. 1914):
Section 25 12
Section 26 ..... 12, 13
Section 242 15
Section 255 13
Section 294, 295 14
Section 707 14
Wigmore on Evidence (3rd ed. 1940) Sec. 2520 (c) 13
2 Corpus Juris Secundum 1050 f. n. 18 14
2 Corpus Juris Secundum 1044 16
3 Williston on Contracts (Rev. ed. 1936):
Sec. 648, 649, 661 17
Statutes:
National Labor Relations Act (Act of July 5, 1935) C. 372, 49 Stat. 449 United States Code Annotated Title 29 (1941 Supplement) paragraph 151 et seq.:
Sec. 7 13
Sec. 8 (1) 11
Sec. 8 (5) 11
Sec. 10 (e) 2, 9
Sec. 10 (f) 2, 9
Preamble (Sec. 1) 17
The Judicial Code Section 240 (a) as amended by the Act of February 13, 1925 (United States Code Annotated Title 28, Paragraph 347) 1, 2, 9

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NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Lebanon Steel Foundry, a Pennsylvania corporation, respectfully prays that a Writ of Certiorari issue to review the Decree of the United States Court of Appeals for the District of Columbia in the above-captioned cause, entered on June 29, 1942, unreported but printed in the Record, page 258.

Jurisdiction.

The Decree of the United States Court of Appeals for the District of Columbia was entered June 29, 1942 (R. 258). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of

February 13, 1925 (United States Code Annotated Title 28, paragraph 347), and under Sections 10 (e) and (f) of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; United States Code Annotated Title 29 (1941 Supplement), paragraph 151, et seq.).

Summary and Short Statement of the Matter Involved.

Petitioner, Lebanon Steel Foundry, a Pennsylvania corporation, with its principal office and plant located in the City of Lebanon, Lebanon County, Pennsylvania, is engaged in the manufacture, sale and distribution of steel castings in interstate commerce.

The Steel Workers Organizing Committee (hereinafter referred to as S. W. O. C.), is a labor organization or union, affiliated with the Congress of Industrial Organizations (hereinafter referred to as C. I. O.).

In September of 1940, the Union began activity among the Petitioner's employees. It secured from 73 employees, membership application cards, exemplified by Board's Exhibit 4A-1, (R. 137).

The membership application cards contained not only an application for membership, but also an express designation of the Union as collective bargaining representative of the persons signing (R. 137).

The Union then learned from some of these employees that they desired to have Union dues deducted or checked off from their wages (R. 105). The organizer thereupon instructed them to procure signatures to check-off cards ("Wage Deduction Authority"), in place of the membership application cards, in soliciting Union members (R. 105).

Thereafter, only the check-off cards were used in soliciting members (R. 105).

The check-off cards ("Wage Deduction Authority") used, are exemplified by Board's Exhibit 5A-1 (R. 137-138), which reads as follows:

Wage Deduction Authority.

Dated .....

No.

To the Paymaster of

I hereby authorize you to deduct from my wages one dollar ($1.00) per calendar month, beginning with the month of —— 19—, provided I have worked a total of five (5) days or more during the calendar month.

This payment to be sent to the Secretary-Treasurer of the S. W. O. C., David J. McDonald, 1500 Commonwealth Building, Pittsburgh, Pa.

This authority to be effective during the life of the agreement. This authority will automatically be cancelled if, as and when the labor and working agreement between your Company and the S. W. O. C. terminates.

....

(Signature) (Address)

There were also distributed for signatures, check-off cards in a form varying somewhat from Board's Exhibit 5A, but Exhibits 5A-1 to 5A-337 (R. 138) were identical with Exhibit 5A-1. The other type or form of check-off card referred to reads as follows:

1537 Wage Deduction Authority

No. Dated .....

To the Paymaster of

I hereby authorize you to deduct from my wages union dues amounting to one dollar ($1.00) per calendar month, provided I have worked a total of five (5) or more days during the calendar month; and my initiation fee (amount specified below) which shall be deducted within one month from the date you received this card from the Financial Secretary of the local union.

Money so deducted to be sent to David J. McDonald, Secretary-Treasurer of the S. W. O. C., 1500 Commonwealth Building, Pittsburgh, Pennsylvania.

This authority shall only be effective during a collective bargaining agreement between the S. W. O. C. and your Company that includes the check-off system.

Initiation Fee, $——.

....

(Signature) (Address)

The check-off cards do not contain an express designation of the Union as collective bargaining representative of the persons signing.

The petitioner admits, for the purposes of the question to be submitted to this Court, that during the time bargaining was requested by the S. W. O. C. (i.e. from December 15, 1940 to January 21, 1941), the S. W. O. C. had obtained from a majority of the employees in the appropriate unit signed check-off cards.

The petitioner declined to recognize the check-off cards ("Wage Deduction Authority") as conferring authority upon the Union to bargain for the signatories of said cards.

Upon the usual proceedings, pursuant to Section 10 of the National Labor Relations Act, which are fully set forth in the Board's Decision (R. 70-72), the Board, on July 10, 1941, issued its Findings of Fact, Conclusions of Law and Order (R. 70-101) to the effect that petitioner refused, in violation of Section 8 (5) and (1) of the said Act, to bargain collectively with the Steel Workers Organizing Committee (the Union), although that organization represented a majority of its employees in an appropriate unit (R. 80, 99-100). The Board directed petitioner to cease and desist from the unfair labor practices found and ordered it to bargain collectively with the Union upon request and to post appropriate notices (R. 100-101).

The National Labor Relations Board found as a fact that the employees of petitioner who signed the check-off cards, thereby designated the Union as their representative for the purpose of collective bargaining. The Board in its Decision, said:

> "We believe and find that those employees of the Respondent who signed check-off cards, thereby designated the Union as their representative for the purposes of collective bargaining." (R. 77).

Your petitioner, aggrieved by the Final Order of the Board, obtained, pursuant to Section 10 (f) of the National Labor Relations Act, a review of such Order in the Court of Appeals for the District of Columbia, by filing in said Court, a Petition praying that the Order of the Board be set aside.

Petitioner predicated its case upon one, and only one, ground, namely, THAT THE WAGE DEDUCTION AUTHORITY OR CHECK-OFF CARDS CANNOT BE CONSTRUED AS DESIGNATING THE UNION THE BARGAINING REPRESENTATIVE OF THE EMPLOYEES WHO SIGNED THE CARDS.

Restated, in the language of the Court of Appeals for the District of Columbia, on the first page of its Opinion (R. 248) the question submitted was as follows:

> "The question is narrow. Shortly, it is whether certain check-off cards signed by employees constituted evidence of authority to bargain collectively."

The United States Court of Appeals for the District of Columbia, upon petitioner's petition to review and set aside the Order of the Board and the Board's Answer thereto, with a request for the enforcement of its Order, in its Opinion handed down June 29, 1942, affirmed the Order of the Board and subsequently, on June 29, 1942, entered an appropriate Decree.

The United States Court of Appeals for the District of Columbia, in an opinion to which Associate Justice Stephens filed a dissenting opinion, held that petitioner had been guilty of an unfair labor practice in refusing to bargain collectively with the union on the grounds that:

(1) the "check-off" cards show on their face an intention to authorize collective bargaining, and

(2) this intention becomes indisputable when the cards are read in view of the proven usages and the circumstances of signature.

In his dissenting opinion Associate Justice Stephens stated that the cards in themselves did not either expressly or impliedly authorize the Union to bargain collectively and that there was no evidence of such usage in the community actually or constructively known to the signers which would supply the verbal deficiency.

The Question Presented.

The single, and perhaps narrow, question presented may be stated as follows:

1. Whether or not the check-off cards ("Wage Deduction Authority") can be construed as designating the Union the bargaining representative of the employees who signed the cards, under the National Labor Relations Act.

If this question is answered in the negative, then, of course, petitioner cannot be guilty of the unfair labor practice of refusing to bargain collectively with the Union as representatives of its employees.

Reasons Relied On for the Allowance of the Writ.

1. The United States Court of Appeals for the District of Columbia has decided a question of general importance relating to the construction and application of a statute of the United States, the National Labor Relations Act, which has not been, but should be, settled by this Court.

The proper interpretation of the question is of general importance to employers and employees in the bargaining

relationship. Section 7 of the National Labor Relations Act confers upon employees "The right * * * to bargain collectively through representatives of their own choosing." It is vital to both employer and employee to know what indicia of agency must be presented on the one hand and accepted on the other. The employer at his peril must bargain with the majority's representative. If the decision of the court below and its doctrine of lax construction is permitted to stand, employers may be impelled to interpret evidence of representation, however weak, as valid designations of agency, in order to avoid the danger of failing to bargain collectively with the majority's representative. Negotiations involving time and effort may be undertaken with an alleged representative which, in fact, was not actually accredited. Conflicting claims to majority representation and the subsequent uncertainty of the employer with whom to deal will be multiplied if the easy canons of the court below are followed.

The policy of the Act is to encourage the practice and procedure of collective bargaining. While the Act provides for an election to determine majority representation, the procedure is relatively cumbersome, and in limine the process of bargaining should not be hampered by bickerings arising out of well-founded doubts as to the right of the "representative" to act in the premises.

2. The United States Court of Appeals for the District of Columbia has decided a question of substance relating to the construction and application of a statute of the United States, the National Labor Relations Act, which has not been, but should be, settled by this Court.

The employer is *compelled*, under the National Labor Relations Act, to bargain collectively only with the representative of the majority. The charge of unfair labor practice can be made against the employer only if he fails to honor demands to bargain by a properly accredited major-

ity representative. Whether in the case at bar the alleged proof of agency which the Union submitted to petitioner was sufficient is a substantial matter. The decision of the court below has, by a process of interpretation at variance with the principles of agency, visited upon petitioner an undeserved onus. The National Labor Relations Act itself does not prescribe the method of designating a representative, and resort should be had to general law to determine the status of the alleged representative. Where, as here, the court below, has gone to unprecedented lengths to construe the check-off cards as designations of a bargaining representative, the propriety of its action should be reviewed by this Court.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of your Honorable Court directed to the United States Court of Appeals for the District of Columbia commanding the court to certify and transmit to this Court for review and determination on a date to be therein named a full and complete transcript of the record and proceedings in the case numbered and entitled on its docket number 7990, Lebanon Steel Foundry (a Pennsylvania corporation), petitioner, v. National Labor Relations Board, respondent, and that the decree enforcing the order of the National Labor Relations Board as entered by said court in said case be reversed by this Honorable Court and that your petitioner have such other and further relief in the premises as to your Honorable Court may seem meet and just.

And your petitioner will ever pray, etc.

H. RANK BICKEL, JR.,
CLARENCE D. BECKER,
H. P. MCFADDEN,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the United States Court of Appeals for the District of Columbia, which is not reported, is set out in (R. 248). The decision and order of the National Labor Relations Board is reported in 33 N. L. R. B. No. 58.

Jurisdiction.

The Decree of the United States Court of Appeals for the District of Columbia was entered June 29, 1942 (R. 258). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (United States Code Annotated Title 28, Paragraph 347), and under Sections 10 (e) and (f) of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; United States Code Annotated Title 29 (1941 Supplement), Paragraph 151, et seq.).

Statement of the Case.

The essential facts of the case are fully stated in the accompanying petition for writ of certiorari and, in the interest of brevity, are not repeated here.

The Law.

The applicable sections of the National Labor Relations Act are set forth in the Appendix to this brief.

Specification of Error.

Petitioner makes the following assignment of error which will furnish the basis for the argument in support of the allowance of the writ:

1. The United States Court of Appeals for the District of Columbia, in affirming the National Labor Relations Board, erred in ruling that the check-off cards were valid designations of the union as the bargaining representative of the signatories to the cards. The assignment of error involves the following considerations of law:

A. The validity of the check-off card as proof of the authority of the union to act as bargaining representative.

(1) On the face of the card itself.

(2) With reference to evidence adduced of an alleged usage.

B. The effect of following the doctrine of the court below.

Summary of Argument.

A. Upon the union was the burden of proving that it was the bargaining representative of a majority of the employees in the appropriate unit. Its status as such representative is dependent upon its being able to show that it was the duly designated bargaining agent of the employees. It relied upon an insufficient designation in the check-off cards, which were the sole evidence of its alleged agency.

The check-off cards do not expressly designate the union the bargaining agent. Nor do they do so by necessary inference. The essence of an agent's status is that he be empowered to affect the principal's legal relations with third persons, and the check-off cards cannot be construed as granting such power to the union.

Nor was it shown that there was any usage which was actually known, or was so notorious that it should have been known, to the signatories, making check-off cards equivalent to designations of a bargaining representative.

B. Designation of a bargaining representative under the National Labor Relations Act should be governed by the general law of agency. To permit loose standards of con-

struction will make the application of the Act confused and inefficient. Petitioner seeks only that the grant of authority be in plain, intelligible language.

ARGUMENT.

A. The validity of the check-off card as proof of the authority of the Union to act as bargaining representative.

(1) On the face of the card itself.

There is no question but that there can have been no violation of Section 8 (5) or Section 8 (1) of the National Labor Relations Act by petitioner in refusing to bargain with S. W. O. C. unless the union did in fact represent a majority of the employees in the appropriate unit.

The only proper evidence in the case upon the point of representation relates to the check-off cards. It is petitioner's contention that it is from the four corners of each check-off card that S. W. O. C. must, if at all, imply that it was designated bargaining representative. Such an implication is, it is submitted, untenable, and it is urged that it can be no more readily inferred from the check-off cards that a bargaining representative was designated than that an express appointment was made. The card is inoperative for the purpose advanced by the union.

The employer is charged with the duty of granting exclusive recognition to the majority's representative. The National Labor Relations Act is silent upon the nature of the designation which is required, and to clarify and settle the questions with reference thereto, the extent and limits of the required authority should be defined. Under Section 7 of the Act employees have the right to bargain collectively through representatives of their own choosing. It needs no citation to show that in acting through a representative the employee has designated an agent to act for him. The

word agent is synonymous with representative, and the assimilation of the two words in connection with the Act is in consonance with their general application: See *Torres* v. *Lothrop*, 231 U. S. 171, 181, 34 S. Ct. 108, 58 L. Ed. 172 (1913). As will be shown hereafter in this Brief, it is functionally important that the rules of agency be applied to the case at bar, and that the matter is more than one of mere terminology. It is necessary, therefore, to analyze the content of the check-off cards to determine wherein they fall short of the creation of an agency.

The Restatement of Agency, Sec. 1, defines agency as

> "* * * the relationship which results from the manifestation of consent by one person that the other shall act on his behalf and subject to his control, and consent by the other so to act."

In less precise language Mechem on Agency (2nd Ed. 1914), Sec. 25, says that the word agency indicates the relation which exists when one person is employed to act for another. In Section 26 Mechem says:

> "The relation of principal and agent, or the relation of agency in the narrower sense in which it is chiefly employed in this work, is the legal relation which exists where one person, called the agent, is authorized—usually by the act of the parties, but occasionally perhaps by operation of law to represent and act for another, called the principal, in the contractual dealings of the latter with third persons. The distinguishing features of the agent may briefly be said to be his representative character and his derivative authority."

Indicative of the consequences of the relationship is the fact that

> "An agent or apparent agent holds a power to alter the legal relations between the principal and third persons and between the principal and himself."

Restatement of Agency, Sec. 12
Comment a. to Section 12 reads:

> "The words 'power of the agent' denote the ability of an agent or apparent agent to affect the legal relations of the principal in matters connected with the agency or apparent agency. The exercise of this power may result in binding the principal to a third person in contract. * * *"

The agent, if sufficiently authorized, may make agreements binding upon his principal. Unless he is deemed to be able to exercise this power he cannot be an agent. Implicit in the concept of agency is the consent of the principal that the agent shall represent him in the stated transaction. Section 7 of the Restatement of Agency reads as follows:

> "Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him."

There is, of course, no disposition on the part of petitioner to declare that the evidence of agency, whether written, oral or of conduct (See Restatement of Agency, Sec. 26), need be express. There are conceivably many situations where the interpretative function of a court is brought into play. Nevertheless, there must be some solid basis, if the authorization is not explicit, from which an agency can be inferred. There is, except in a few cases not here important, no presumption of agency in the law; it is a fact to be proved, and the person alleging it must prove it by a preponderance of the evidence: Mechem on Agency (2nd ed. 1914), Sec. 255; Wigmore on Evidence (3rd ed. 1940), Sec. 2520 (c), which says:

> "The authority of an agent, purporting to execute for his principal, is not presumed."

And

> "Whether a certain writing or a series of writings creates an agency or not, and if so, what is the nature and extent of the power conferred, the writing being produced, and being couched in such terms as to require no aid from extrinsic evidence, are questions of law for the decision of the court."
>
> Mechem on Agency (2nd ed. 1914), Sections 294, 295; Restatement of Agency, Sec. 32.

The authority of an agent, insofar as his relation to his principal is concerned, may be either express or implied: Mechem on Agency (2nd ed. 1914), Sec. 707. The Restatement of Agency, perhaps more grammatically, calls "implied authority" "inferred authority" and distinguishes it from the other traditional category, apparent authority.

Express authority and implied authority are both actual authority, and are founded upon the principal's directions or conduct toward his agent.

> "Implied agency is actual agency, and the difference between it and express agency is mainly one of the method of proof * * *."
>
> Dobbs v. Zink, 290 Pa. 243, 247, 138 A. 758 (1927). See also 2 C. J. S. 1050 f. n. 18.

Certainly in the instant case the alleged authority cannot be called express. Nor, obviously is it necessary to consider it under the heading of apparent authority. The sole problem is whether the union was actually authorized to act as the agent of the signatories to the cards. Nor is "incidental authority" to be given any weight. The last named is the "authority to do all those incidental acts, naturally and ordinarily done in such a case, which are reasonably necessary and proper to carry into effect the main power so conferred": Mechem on Agency (2nd

ed. 1914), Sec. 242. Manifestly, for incidental authority to be operative there must be some prior and indisputable grant of authority to call it into being. In the case at bar it is this grant of authority which we are seeking by an examination of the check-off cards.

The check-off card is entitled "Wage Deduction Authority". It is addressed ostensibly to the paymaster, but custody was entrusted to the union. The authority (i. e., the authority to deduct dues) was to be effective during the life of the "agreement", and automatically cancellable "when the labor and working agreement between your company and the S. W. O. C. terminates." (The alternative form is similar.) It is submitted that the card cannot be viewed as granting to the union *the power of affecting the signatory's legal relationship with the company by the execution of an agreement referred to,* the *sine qua non* of agency, as the above discussion shows. In no way can it be inferred that the signatory agreed to abide by the terms of the " agreement". That the agreement is mentioned in the card merely makes the authority of the paymaster to deduct possible dues dependent and contingent upon the execution of an agreement. It sets a time upon and during which the authority of the paymaster is to exist. It creates no agency in the union to negotiate an agreement for and on behalf of the signatory; the card in issue did not, in express terms or by reasonable inference, make the "agreement" (as yet in future) binding, when executed, upon the employee. *Certainly an employer is not to be burdened with the obligation of bargaining and executing an agreement with a purported agent, when there is no assurance that the agreement will "stick".* It may be granted, perhaps, that there would be some measure of ratification of an agreement not previously authorized if the employee should eventually permit a check-off without protest; it is not, however, the signing of the check-off card which could

be thought to found the agency, but the non-exercise of the power, by the employee, to revoke the authority of the paymaster to deduct $1.00 from his monthly wages.

Petitioner has not been captious in its interpretation of the check-off cards (Board's Exhibits 5A-1 to 337 (R. 137-138), though there is no qualification of the potential deductions—they are not called union dues, but are to be sent to the union secretary, according to the cards. It is submitted that the defect in the cards, from the standpoint of creating an agency, is so basic and fundamental that even the express designation of the possible future deductions as union dues in the other form makes no difference.

Counsel has been able to find no court opinion which has passed upon the precise problem of the present case. In all cases heretofore decided by the courts, in which the sufficiency of cards as a means of designation was raised, the cards evidenced a *present* intention on the part of the signers to become members of the union. (See cases cited by majority opinion in court below on Page 5 of its printed opinion.) While actual membership by an employee in a union may not be necessary for the union to represent him in collective bargaining, it is submitted that it is essential that there be an inescapable and present designation of the union as a bargaining agency; this requirement is not met by the check-off cards. Where there is actual membership in the union there is no problem at all; similarly, an application for membership is also sufficient, on the ground it evinces a present desire that the union represent the applicant, which the union is authorized to fulfill without doing violence to the general principle of agency law that if the agent proceeds to act under the appointment it is unnecessary to give the principal express notice of acceptance, if he proceeds to act within a reasonable time: See 2 C. J. S. 1044.

(2) With reference to evidence adduced of an alleged usage.

Petitioner was placed in the position of deciding, at its peril, whether or not the union was the agent of a majority of the employees. There is no sufficient evidence in the record to prove the existence of any usage or custom insofar as the union and its negotiations with other employers are concerned, and there is no evidence to prove any knowledge, real or constructive, of such a usage or custom on the part of petitioner and its employees. See (R. 130).

In the majority opinion it was decided that the cards themselves evidenced a sufficient grant of authority, and that in view of the usage and custom, the intent of the cards becomes inescapable. Associate Justice Stephens clearly points out that the testimony fails to establish a definite usage generally adopted, and that apart from such inadequacy, there was no testimony that any usage or custom was brought home to the signatories of the cards, whether because of actual knowledge, or because the usage or custom was so notorious that the employees must have known of it. The citation, in the minority opinion, of 3 Williston on Contracts (Rev. ed. 1936), Sections 648, 649, and especially 661 is pertinent.

On both counts the check-off cards are insufficient. Alone they grant no authority to bargain, nor are they supplemented by any established usage.

B. The Effect of Following the Doctrine of the Court Below.

The question raised in this case is of general importance in the construction and application of the National Labor Relations Act. The preamble (Sec. 1) of the Act (29 U. S. C. A. Sec. 151) states that one of its purposes is the removal of certain recognized sources of industrial strife and unrest,

by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours or other working conditions, and by restoring equality of bargaining power between employers and employees—in short, collective bargaining.

The only basis upon which successful and efficient collective bargaining can be predicated is the establishment of definite and specific rules governing the employer's duty and the union's right to bargain. If the present decision of the court below and the loose standards it sets are to remain the law, both employers and employees will be in the position of attempting to adjust fundamental and important rights without a definite guide as to what constitutes and what does not constitute a representative for the purpose of bargaining. The Act itself is silent upon the subject, but it is submitted that collective bargaining can be encouraged only if the rules governing the designation of representatives should follow the general rules of agency law. Should courts be permitted to range far afield without reference to the traditional yet entirely adequate and adaptable principles of the law of principal and agent, there will be confusion in the application of the Act. Courts given to what to them seems a liberal, or lax, construction, will fix a standard in line with their policies, while courts applying strict standards of construction will arrive at a contrary result, so that a process which should be orderly and effective will become confused and difficult in its operation.

To permit a fundamental feature of the Act to be rendered uncertain by allowing the construction of documentary or other evidence as proof of authority in as facile a manner as the court below is to promote industrial strife rather than to obviate it, in the very teeth of the Act (See *N. L. R. B.* v. *Bradford Dyeing Assn.*, 310 U. S. 318, 326, 60 S. Ct. 918, 84 L. Ed. 1226 (1940)). It is not that petitioner contends, as the majority opinion in the court below thought,

that any technical formula is necessary to designate a bargaining representative, any more than such formality is necessary to appoint an agent in all but a few special instances (See Restatement of Agency, Sec. 26). However idiosyncratic the general vocabulary of labor is, there is no magic in mere peculiarity which would enable a court to construe the check-off cards as conferring a power to bargain. The logic is askew—labor speaks unintelligibly, the check-off cards do not have any intelligible bearing upon the question, therefore the signers must have intended to designate a representative. It would be far better to formulate a standard which will require labor to speak intelligibly to third parties, no matter how cabalistic may be its speech within the fold. Petitioner seeks no more rigid a ruling than that the "representative" show in plain or understandable language that it is authorized. Construction of the Act in the light of the general law of agency, so far from encasing it in an alien and unsocial inflexibility, will render it more workable.

Furthermore, there is no more reason why an employer should be obliged to *guess* whether an alleged representative is duly authorized to bargain for a binding agreement, than there would be to force him to guess as to comparably important claims, which can as easily be evidenced by definite proof. One seeking to bargain should display its badge of authority with reasonable clearness. To saddle the employer with the hazards attendant upon a bona fide but mistaken guess is unfair. Once it is laid down by the highest court that the designation of a representative must be couched in terms plainly referable to the purpose, a source of confusion will be removed. The energies of the parties will be saved for the actual bargaining, and will not be wasted upon preliminary haggling; nor, if the employer is timorous, will he be precipitated into bargaining with a representative without portfolio.

And it should not be forgotten that under Section 10 (f) of the Act the United States Court of Appeals for the District of Columbia has the right to review cases under the Act arising in all states of the Union, and that therefore its decisions in matters of construction and application of the Act have nationwide significance.

Conclusion.

It is accordingly submitted that the petition for certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner.



APPENDIX.

Statute Involved.

The following Sections of the National Labor Relations Act, July 5, 1935, c. 372, 49 Stat. 449, Title 29 U. S. C. A. (1941 Supplement) Sec. 151 et seq., are involved.

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Section 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

Section 9 (a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

Section 10 (e). Petition to court for enforcement of order; proceedings; review of judgment. The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the district court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides

or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 346 and 347 of Title 28.

Section 10 (f). Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such Court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	6
Conclusion	11

CITATIONS

Cases:

C. A. Lund Company, In re and *Novelty Workers Union, Local 1866*, 6 N. L. R. B. 423	8
Century Mills, Inc., In re, 5 N. L. R. B. 807	9
DeKay, Clifford M., Matter of and *International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Local Union No. 649*, 2 N. L. R. B. 231	8
Denver Automobile Dealers Association, 10 N. L. R. B. 1173	9
Elbe File and Binder Co., Inc., Matter of and *Bookbinders, Manifold and Pamphlet Division, Local Union No. 119, International Brotherhood of Bookbinders*, 2 N. L. R. B. 906	8
National Labor Relations Board v. *Bradford Dyeing Ass'n*, 310 U. S. 318	8
National Labor Relations Board v. *Louisville Refining Co.*, 102 F. (2d) 678, certiorari denied, 308 U. S. 568	8
National Labor Relations Board v. *Lund*, 103 F. (2d) 815	8
National Labor Relations Board v. *National Motor Bearing Co.*, 105 F. (2d) 652	8
National Labor Relations Board v. *Remington Rand, Inc.*, 94 F. (2d) 862, certiorari denied, 304 U. S. 576	10
National Labor Relations Board v. *Somerset Shoe Co.*, 111 F. (2d) 681	8
National Motor Bearing Company, In re and *International Union, United Automobile Workers of America, Local No. 76*, 5 N. L. R. B. 409	8
Rabhor Co., Inc., In re and *International Ladies' Garment Workers Union*, 1 N. L. R. B. 470	9

482945—42

Statutes: Page

National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., sec. 151):
Section 9, 29 U. S. C., sec. 159 (c) ---------- 10

Miscellaneous:

Fifth Annual Report of the National Labor Relations Board, pp. 45–46 ---------- 10

National Labor Relations Board Rules and Regulations, Series 2, as amended, effective, September 6, 1941:
Article III ---------- 10

Sixth Annual Report of the National Labor Relations Board, p. 50 ---------- 10

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 293

LEBANON STEEL FOUNDRY (A PENNSYLVANIA CORPORATION), PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinions of the court below (R. 248–257) are not yet reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 70–101) are reported in 33 N. L. R. B. 233.

JURISDICTION

The decree of the court below (R. 258) was entered on June 29, 1942. The petition for a writ of certiorari was filed on August 11, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of

February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTION PRESENTED

The sole question presented in this case is whether there is substantial evidence to support the Board's finding that the majority of petitioner's employees, by signing certain check-off cards, designated Steel Workers Organizing Committee as their collective bargaining representative.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., sec. 151 *et seq.*) are set forth in petitioner's Appendix (Pet. 21–23).

STATEMENT

Upon the usual proceedings, the Board on July 10, 1941, issued its decision (R. 70–101) in which it found that petitioner had refused to bargain collectively with Steel Workers Organizing Committee (hereinafter called the Union), in violation of subsections (5) and (1) of section 8 of the Act. Petitioner offers no challenge to the Board's findings except the finding that the Union had been designated as collective bargaining representative by a majority of petitioner's employees in the appropriate unit.[1] We therefore omit a statement of the

[1] Petitioner also admits, for the purposes of the question presented, that during the period bargaining was requested by the Union, the Union had secured signed check-off cards from a majority of petitioner's employees in the appropriate unit (Pet. 4).

evidence supporting the Board's findings except the evidence pertaining to the single issue which petitioner raises in this Court. On that issue, the Board's findings and the supporting evidence are as follows:[2]

Union activities among petitioner's employees began in September 1940, when a group of employees approached a Union organizer at a nearby steel plant and secured membership application cards from him (R. 74; 103–105, 121, 137). Each membership application card contained, in addition to an application for membership, an express designation of the Union as collective bargaining representative of the signer (R. 74; 137). After a number of these cards had been executed by petitioner's employees, the Union's district representative met with some of the employees, at their request, in September 1940 (R. 74; 103, 121). At this meeting, when the employees expressed a desire for a check-off or deduction of union dues from their wages, they were instructed by the Union representative to use "Wage Deduction Authority" or check-off cards in lieu of membership application cards in soliciting Union members (R. 74–75; 105, 126). Check-off cards, to be signed by those employees who previously had executed membership application cards, were distributed and, there-

[2] In the following statement, references preceding the semicolons are to the Board's findings, and the succeeding references are to the supporting evidence.

after, only check-off cards were used in obtaining union members (R. 75; 105–107, 126–127).

The check-off cards were of two types, used interchangeably, and read as follows (R. 75–76; 106, 123–124, 137–138):

WAGE DEDUCTION AUTHORITY

No.---------- Dated----------

To the Paymaster of

I hereby authorize you to deduct from my wages one dollar ($1.00) per calendar month, beginning with the month of ----------, 19---- provided I have worked a total of five (5) days or more during the calendar month.

This payment to be sent to the Secretary-Treasurer of the S. W. O. C., David J. McDonald, 1500 Commonwealth Building, Pittsburgh, Pa.

This authority to be effective during the life of the agreement. This authority will automatically be cancelled if, as and when the labor and working agreement between your Company and the S. W. O. C. terminates.

---------- ----------

(Signature) (Address)

WAGE DEDUCTION AUTHORITY

No.---------- Dated----------

To the paymaster of

I hereby authorize you to deduct from my wages union dues amounting to one dollar ($1.00) per calendar month, provided I have

worked a total of five (5) or more days during the calendar month; and my initiation fee (amount specified below) which shall be deducted within one month from the date you received this card from the Financial Secretary of the local union.

Money so deducted to be sent to David J. McDonald, Secretary-Treasurer of the S. W. O. C., 1500 Commonwealth Building, Pittsburgh, Pennsylvania.

This authority shall only be effective during a collective bargaining agreement between the S. W. O. C. and your Company that includes the check-off system.

Initiation fee, $----------

---------- ----------

(Signature) (Address)

The uncontradicted testimony of the Union's district representative showed that check-off cards had been used throughout his district to signify Union membership as well as authority to deduct Union dues; that the Union customarily organized plants in the area by having employees sign such cards; and that employers operating such union-organized plants accepted check-off cards as proof of the desire of signatories to have the Union represent them (R. 76; 106, 129–131).

Upon the basis of the foregoing findings and evidence, the Board found that petitioner's employees who signed the check-off cards had thereby designated the Union as their representative for collective bargaining purposes (R. 77).

The Board made further findings that the Union, thus designated as collective bargaining representative by a majority of petitioner's employees (R. 79–80) in an appropriate unit (R. 74), sought to bargain with petitioner on several occasions from December 16, 1940, to January 23, 1941, but that petitioner at all times failed and refused to bargain collectively with the Union in good faith (R. 80–98), in violation of Section 8 (5) and (1) of the Act (R. 98, 99–100). At no time during the fruitless negotiations did petitioner raise the issue now presented or voice any doubts as to the Union's majority status (R. 80–82, 84–85, 94–95, 96).

The Board's order required petitioner to cease and desist from its unfair labor practices; to bargain collectively, upon request, with the Union; and to post appropriate notices (R. 100–101).

On July 29, 1941, petitioner filed in the court below a petition to review and set aside the Board's order (R. 138–147). The Board answered, requesting enforcement of its order (R. 148–152). On June 29, 1942, the court below, Stephens, J. dissenting, handed down its opinion and entered its decree affirming and enforcing the Board's order (R. 248–258).

ARGUMENT

1. The sole issue here presented is whether evidence supports the Board's finding (R. 80) that the Union was designated as collective bargaining rep-

resentative by petitioner's employees, a majority of whom admittedly signed check-off cards. This ultimate finding is based upon the subsidiary finding that the authorizations of wage deductions in the circumstances of this case evidenced a "present desire to become and be a member of" the Union, and in any event evinced "a desire to have [the Union] * * * negotiate a contract" (R. 77). The Board's finding is undeniably proper. Uncontradicted evidence establishes that the check-off cards were regarded and used as membership application cards both by the Union and by the subscribing employees (R. 105–107, 126–127). Such check-off cards were substituted for membership application cards as a result of a request from the employees to the Union representatives for the establishment of a check-off of union dues from their wages (*id.*). The substitution was made at the beginning of the Union's campaign to organize the employees in petitioner's plant (*id.*), and all those who had already signed membership application cards signed the check-off cards as well, after which only the latter were used (R. 126–127).

Petitioner's contention that the employees who signed check-off cards did not thereby intend to designate the Union to bargain for them ignores the elementary and universally known fact that employees join and affiliate with unions for the primary purpose of collective bargaining over wages, hours, and working conditions. The Courts and

the Board have heretofore found that designation of a union as collective bargaining representative was manifested by mere application for union membership, subscription of union registration cards, participation in a strike vote taken by a union, participation in a strike called by a union, and acceptance of strike benefits from a union. Thus, in *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, 310 U. S. 318, 338–339, the Court sustained the Board's finding of designation for collective bargaining where the employees had signed membership applications without paying dues or initiation fees. See also *In re National Motor Bearing Company* and *International Union, United Automobile Workers of America, Local No. 76*, 5 N. L. R. B. 409, 427–428, enf'd as to this point in *National Labor Relations Board* v. *National Motor Bearing Co.*, 105 F. (2d) 652 (C. C. A. 9).[3]

[3] Also *National Labor Relations Board* v. *Louisville Refining Co.*, 102 F. (2d) 678, 680 (C. C. A. 6), certiorari denied, 308 U. S. 568 (union membership application); *National Labor Relations Board* v. *Somerset Shoe Co.*, 111 F. (2d) 681, 687 (C. C. A. 1) (union membership application); *Matter of Elbe File and Binder Co., Inc.* and *Bookbinders, Manifold and Pamphlet Division, Local Union No. 119, International Brotherhood of Bookbinders*, 2 N. L. R. B. 906, 910 (union registration cards); *Matter of Clifford M. DeKay* and *International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Local Union No. 649*, 2 N. L. R. B. 231, 237 (union membership applications, although dues or initiation fees not yet paid and not yet admitted to membership); *In re C. A. Lund Company* and *Novelty Workers Union, Local 1866*, 6 N. L. R. B. 423, 435, enf'd on this issue and remanded on other grounds, *National Labor Relations*

Moreover, by their very terms, the check-off cards signed in this case manifest a desire to designate the Union as collective bargaining representative. The cards specifically provide for deductions from wages for "union dues" and "initiation fee"; they make express reference to a contemplated agreement between the Union and petitioner, viz, "the labor and working agreement" and "a collective bargaining agreement" (R. 75–76). Unless this language is meaningless, it necessarily signifies the signer's desire that the Union represent him, bargain for him, conclude an agreement, and receive the checked-off wages as union dues. Any other interpretation is wholly unrealistic. But if there were any reason to doubt that this was what the parties intended, all doubt would be dispelled by the fact that check-off cards customarily were used throughout the Union district to denote Union membership as well as authority to deduct Union dues from the employees' wages (R. 106, 129–131).

2. The question in this case is not one of general importance. It has not arisen heretofore, and the Board's experience does not show it to be a prominent issue. Petitioner's suggestion (Pet. 7, 19)

Board v. *Lund*, 103 F. (2d) 815 (C. C. A. 8) (participation in strike vote taken by union); *In re Century Mills, Inc.*, 5 N. L. R. B. 807 (participation in strike called by union); *Denver Automobile Dealers Association*, 10 N. L. R. B. 1173 (participation in strike called by union); *In re Rabhor Co., Inc.* and *International Ladies' Garment Workers Union*, 1 N. L. R. B. 470, 474–476 (acceptance of strike benefits from union).

that doubts regarding union designation might arise in the minds of employers in other cases as a result of the decision below, overlooks the fact that, where such doubts arise in good faith, adequate machinery exists whereby they may be resolved.[4] (See section 9 (c) of the Act, 29 U. S. C. 159 (c); see also Art. III, National Labor Relations Board Rules and Regulations, Series 2, as amended effective September 6, 1941, where the various means are detailed of determining whether a Union represents a majority of the employees.) An employer who in good faith entertains doubt as to whether a Union actually represents a majority of his employees and for that reason refuses to recognize the union as the employees' representative, does not commit an unfair labor practice in refusing to bargain with that union until adequate evidence is submitted to him to show that the union is the designated bargaining representative (see Fifth Annual Report of the National Labor Relations Board, pp. 45–46, Sixth Annual Report of the National Labor Relations Board, p. 50; see also *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 868 (C. C. A. 2, certiorari

[4] Petitioner had no such doubts here. See *supra*, p. 6. The record shows that petitioner was not misled by the check-off cards. At both the December 21 and January 10 meetings the Union claimed to represent a majority of the employees and offered the check-off cards as proof. Neither time did petitioner express doubt that the Union did represent a majority of the employees, and neither time did petitioner inspect the check-off cards. (R. 81, 84, 85.)

denied, 304 U. S. 576). Petitioner's own refusal to bargain collectively with the Union was not predicated on doubt as to the majority status of the Union, and petitioner showed profound disinterest in the Board's proposal to hold an election to determine the bargaining representative (R. 90–92). Hence the problem presented in the instant case, which has not heretofore occurred in the experience of the Board, does not present a question of general importance.

CONCLUSION

The decision of the court below enforcing the Board's order is correct. No conflict or other reason for the further review of the order is presented. It therefore is respectfully submitted that the petition for a writ of certiorari should be denied.

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